STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED March 10, 2005
v	No. 253120 Wayne Circuit Court
JASON DESHAUN JACKSON, Defendant-Appellant.	LC No. 03-010328-01

Before: Zahra, P.J., and Murphy and Cavanagh, JJ.

PER CURIAM.

A jury found defendant guilty of armed robbery, MCL 750.529, assault with a dangerous weapon (felonious assault), MCL 750.82, felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony, MCL 750.227b.[1] He was sentenced as a second habitual offender, MCL 769.10, to 12 to 20 years' imprisonment for the armed robbery conviction, 2 to 4 years' imprisonment for the felonious assault conviction, 3 to 5 years' imprisonment for the felon-in-possession conviction, and a consecutive 2-year prison term for the felony-firearm conviction. Defendant appeals as of right. We affirm with respect to all of the issues presented, except as to defendant's double jeopardy argument, on which matter we vacate the conviction and sentence for felonious assault.

Defendant first argues that he was denied due process and suffered prejudice, where the jury heard a stipulation that was placed on the record acknowledging defendant's prior felony conviction relative to the charge of felon-in-possession, where the prosecutor expounded about his felony record during closing argument, and where the court instructed on the matter at length. Defendant claims that it was unnecessary to inform the jury of his prior felony, as it "could have been the subject of a conditional plea before trial or a plea after conviction or of a separate jury finding after the verdict."

With respect to the crime of felon-in-possession, adequate safeguards can be erected to ensure that a defendant does not suffer unfair prejudice that might inhere to the defendant when a prior felony is made known to the jury. *People v Mayfield*, 221 Mich App 656, 659-660; 562

[1] Defendant was acquitted of assault with intent to commit murder and assault with intent to do great bodily harm less than murder.

NW2d 272 (1997). Specifically, a defendant's conviction can be introduced through a stipulation, limiting instructions can be given to the jury, emphasizing that each count of the indictment or information must be given separate consideration, and instructing the jury to consider the prior conviction solely as it relates to the felon-in-possession charge. *Id.* at 660 (citation omitted).

Here, the following stipulation was placed on the record:

> *Prosecutor*. Your Honor, before I call the next witness, counsel and I have a stipulation that I would like to place on the record. And that is that the defendant . . . was convicted of a felony back in September 2001 such that he was ineligible to be carrying or possessing a firearm as of the date of this offense.
>
> *Trial Court.* Is that a correct stipulation?
>
> *Defense Counsel*. That is, Judge.

Further, our review of the record shows that during closing argument, the prosecutor briefly touched on the felon-in-possession charge, stating simply that defendant had a past felony and had no right to be carrying a weapon. This is no more revealing than the stipulation placed on the record. The trial court's instruction on felon-in-possession merely noted the elements of the crime. Moreover, the court followed the felon-in-possession instruction with cautionary and limiting instructions, telling the jurors that they could only consider the prior conviction for purposes of the felon-in-possession charge and that they could not use the prior felony as a basis to find that defendant was a bad person or had a propensity to commit crime.

Defendant's argument that the jury should not have been informed of the prior felony conviction and that he was prejudiced by the introduction of the evidence was effectively waived by way of the stipulation. *People v Carter,* 462 Mich 206, 215-216; 612 NW2d 144 (2000). Although ineffective assistance of counsel in relation to this issue was not raised in the statement of issues presented, defendant makes a fleeting reference that counsel should have moved to disjoin the felon-in-possession count. Considering that all of the *Mayfield* procedural safeguards were implemented, that the nature of the underlying felony was never revealed to the jury, and that neither the court nor the prosecutor made any improper statements regarding the past offense, defendant fails to show that counsel's performance was deficient, nor is the necessary prejudice established. See *People v Carbin,* 463 Mich 590, 599-600; 623 NW2d 884 (2001). Reversal is unwarranted.

Defendant next argues that the trial court erred in denying his motion for directed verdict on the armed robbery charge, where there was "insufficient evidence that defendant stole anything."

A trial court's ruling on a motion for directed verdict is reviewed de novo on appeal. *People v Kris Aldrich,* 246 Mich App 101, 122; 631 NW2d 67 (2001). This Court must view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *Id.* at 122-123. This Court will not interfere with the trier of fact's role of determining the

weight of the evidence or the credibility of witnesses. *People v Wolfe*, 440 Mich 508, 514-515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992). Circumstantial evidence and reasonable inferences that arise from that evidence can constitute satisfactory proof of the elements of the crime. *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999). All conflicts in the evidence must be resolved in favor of the prosecution. *People v Terry*, 224 Mich App 447, 452; 569 NW2d 641 (1997).

We first note that although defendant moved for a directed verdict, the motion focused only on the claim that the evidence was insufficient to sustain a conviction for assault with intent to commit murder; there was no argument pertaining to armed robbery. Nonetheless, we shall treat this argument simply as one challenging the sufficiency of the evidence. The standards cited above are equally applicable to sufficiency claims.

The elements of armed robbery are: (1) an assault, and (2) a felonious taking of property from the victim's presence or person, (3) while the defendant is armed with a weapon described in the statute, MCL 750.529. *People v Rodgers*, 248 Mich App 702, 707; 645 NW2d 294 (2001). Any movement of the property being taken, even if by the victim under the direction of the armed defendant, constitutes asportation for purposes of armed robbery despite the fact that the defendant never reduced the money or property to physical possession. *People v Randolph*, 466 Mich 532, 541; 648 NW2d 164 (2002); *People v McGuire*, 39 Mich App 308, 314-315; 197 NW2d 469 (1972); *People v Royce Alexander*, 17 Mich App 30, 32-33; 169 NW2d 190 (1969).

Here, there was evidence that defendant forced the victim to empty his own pockets, or that defendant actually emptied the victim's pockets himself, and that a diamond ring, a pocketknife, keys, change, a wallet, and a cell phone were removed from the victim's person. Moreover, there was evidence that defendant rifled through the victim's wallet before throwing it on the ground. It is immaterial that the articles of property removed from the victim were not permanently reduced to defendant's physical possession. The prosecution presented sufficient evidence to support the armed robbery conviction.

Defendant next argues that he was deprived of due process and his right to a fair trial, where the police failed to preserve a critical piece of evidence, and where the trial court failed to give the jury an adverse inference instruction in light of the police department's failure to preserve evidence. Specifically, defendant contends that his clothing should have been preserved and that his pants would have shown a lack of gunpowder residue, thus supporting his claim that he was shot from long range by someone in the Blazer.

This issue was not raised below; therefore, we review for plain error affecting defendant's substantial rights. *Carines, supra* at 763-764. "Failure to preserve evidentiary material that may have exonerated the defendant will not constitute a denial of due process unless bad faith on the part of the police is shown." *People v Hunter*, 201 Mich App 671, 677; 506 NW2d 611 (1993). In *People v Leigh*, 182 Mich App 96, 98; 451 NW2d 512 (1989), this Court stated that where "the state has failed to preserve evidentiary material of which no more can be said than that it could have been subjected to tests the results of which might have exonerated the defendant, the failure to preserve the potentially useful evidence does not constitute a denial of due process unless a criminal defendant can show bad faith on the part of the police."

Here, defendant only speculates that the evidence may have exonerated him, and there is no evidence of bad faith on the part of the police. When police arrived at the crime scene, they found defendant with a gunshot wound and treated him as the victim after he informed them that he had been shot by individuals in a Blazer. Defendant was then transported to the hospital for treatment of his gunshot wound. There was no evidence regarding whether the police even had the opportunity early on to secure the pants in light of the emergency situation, nor was there any evidence indicating what became of defendant's pants after he arrived at the hospital. In fact, when the prosecutor attempted to question defendant's medical expert as to whether he asked defendant or defense counsel concerning the location of the pants, defense counsel objected. The expert then testified that no pants were provided to him. On this record, reversal is unwarranted.

Finally, defendant argues that his right against twice being placed in jeopardy was violated when he was charged and convicted of armed robbery, felonious assault, and felon in possession. Defendant failed to preserve this issue; however, this Court reviews a double jeopardy issue regardless of whether the defendant raised the issue in the trial court because it involves a significant constitutional question. *People v Colon*, 250 Mich App 59, 62; 644 NW2d 790 (2002). The United States and the Michigan Constitutions prohibit placing a defendant twice in jeopardy for a single criminal offense. US Const, Am V; Const 1963, art 1, § 15. The Double Jeopardy Clause protects, in part, against multiple punishments for the same offense. *Colon, supra* at 62.

Our Supreme Court in *People v Denio*, 454 Mich 691, 707-708; 564 NW2d 13 (1997), distinguishing the tests for double jeopardy under the United States and Michigan Constitutions, stated that under *Blockburger v United States*, 284 US 299, 304; 52 S Ct 180; 76 L Ed 306 (1932), if the same act or transaction constitutes a violation of two distinct statutory provisions, the federal test is whether each provision requires proof of a fact which the other does not. This test typically results in a double jeopardy violation where one is punished for a greater offense and a lesser included offense. *Denio, supra* at 707. If the *Blockburger* test is satisfied, a presumption arises that the Legislature did not intend to punish the defendant under both statutes. *Id.* However, the presumption is rebutted by a clear indication that the Legislature intended punishments under both statutes. *Id.*

The *Denio* Court further stated that "[t]his Court has rejected the *Blockburger* test in analyzing the Double Jeopardy Clause of the Michigan Constitution, and instead uses traditional means to determine the intent of the Legislature, such as the subject, language, and history of the statutes." *Id.* at 708.[2]

In *People v Yarbrough*, 107 Mich App 332, 334-336; 309 NW2d 602 (1981), this Court, addressing a double jeopardy issue involving armed robbery and felonious assault convictions, rejected the prosecutor's argument that the defendant committed two distinct assaults on the

[2] We note that our Supreme Court's recent decision in *People v Nutt*, 469 Mich 565; 677 NW2d 1 (2004), is not implicated in this case. Although the Supreme Court undertook an extensive analysis concerning the law pertaining to double jeopardy, the opinion was expressly limited to the successive prosecutions strand of double jeopardy and not the multiple punishments strand. *Id.* at 575 n 11.

victim, first by pointing a gun at the victim and secondly by using the gun to beat her about the head while stealing her purse. The *Yarbrough* panel stated:

> The elements of armed robbery under MCL 750.529 . . . include an assault while being armed with a dangerous weapon. Thus, in an armed robbery, a felonious assault utilized to accomplish the larceny factually is included within the greater charge. The notion that the Legislature did not intend to punish such an assault as a separate offense where injury is inflicted but to provide for a greater penalty for armed robbery is supported by the following language from the armed robbery statute:
>
> "If an aggravated assault or serious injury is inflicted by any person while committing an armed robbery as defined in this section, the sentence shall be not less than 2 years' imprisonment in the state prison."
>
> This Court has held that assault is an included offense of armed robbery. *In summary, an assault should be punished as an offense separate from armed robbery only where it can clearly be established that the offenses occurred at separate times.* On the facts herein, defendant's right against double jeopardy was violated by his convictions of both crimes. Therefore, his felonious assault conviction must be vacated. [*Yarbrough, supra* at 335-336 (citations omitted; emphasis added).]

Although *Yarbrough* was decided under *People v Jankowski*, 408 Mich 79; 289 NW2d 674 (1980), a case that applied the *Blockburger* test in the context of Michigan's constitutional double jeopardy protection, we find that its analysis concerning separate offenses and legislative intent is sufficient under *Denio* and should be applied here. We also note that in *Colon, supra* at 63, this Court stated that there is no violation of double jeopardy if one crime is complete before the other takes place, even if the offenses share common elements or one constitutes a lesser offense of the other. The *Colon* panel indicated that assaults could be distinguished if the incidents were separate and distinct from each other. *Id.*

Here, the armed robbery and felonious assault did not clearly occur at separate times. The assaultive behavior that formed the basis of the armed robbery offense cannot be distinguished from any assaultive behavior that formed the basis of the felonious assault offense. At the time that defendant shot the victim and the ensuing struggle occurred, defendant had been in the process of forcing the victim at gunpoint to go outside to the Blazer to retrieve cash. Therefore, an armed robbery remained in progress and was continuing when the shooting took place regardless that defendant's pockets had already been emptied of items at defendant's demand. The felonious assault occurred as soon as defendant trained the firearm on the victim, and the armed robbery commenced almost immediately thereafter. The felonious assault continued throughout the time that defendant wielded the gun.[3] The victim was the subject of a

[3] Our scenario is similar to that which played out in *Yarbrough*, wherein this Court stated:

(continued…)

continuing assault during an armed robbery. Accordingly, we vacate the felonious assault conviction and sentence. See *People v Herron,* 464 Mich 593, 609; 628 NW2d 528 (2001) (remedy for double jeopardy violation involving multiple punishments is to affirm the greater offense and vacate the lower conviction).

Having vacated the felonious assault conviction and sentence, we now address whether defendant's convictions of both armed robbery and felon-in-possession violated double jeopardy protections. We conclude that the Legislature intended multiple punishments because the armed robbery statute and the felon-in-possession statute are unquestionably aimed at distinctly different conduct. See *Mayfield, supra* at 662. The felon-in-possession statute "is aimed at protecting the public from guns in the hands of convicted felons[.]" *Id.* The language of the armed robbery statute indicates "that the Legislature intended to prohibit takings accomplished by an assault and the wielding of a dangerous weapon." *People v Parker,* 230 Mich App 337, 343; 584 NW2d 336 (1998). Because the statutes are aimed at different conduct, the convictions and sentences for armed robbery and felon-in-possession do not violate defendant's double jeopardy protections.

We affirm with respect to all of the issues presented, except as to defendant's double jeopardy argument, on which matter we vacate the conviction and sentence for felonious assault.

/s/ Brian K. Zahra
/s/ William B. Murphy
/s/ Mark J. Cavanagh

(…continued)

> The crucial distinction herein is that from the time defendant pointed the gun at complainant saying "This is a stick up", through his actions in beating her and shoving her against the wall, he was attempting to take her purse from her. Thus, neither of the two alleged assaults was complete before the robbery began. Nor was the robbery complete prior to the pointing of the gun or the beating. We conclude that complainant was the victim of a continuing assault during an armed robbery. [*Yarbrough, supra* at 335.]